A

Novabrite Lighting Sdn Bhd v Emrail Sdn Bhd (Balaranee Construction, proposed intervener)

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-14–04 OF 2024
SAHERAN SUHENDRAN JC
18 NOVEMBER 2024

C

Companies and Corporations — Judicial management ('JM') — Abuse of process — Whether third party's application to place ailing company under JM was abuse of process — Whether subject company had constantly been under JM over four years consequent upon applications of various parties yet had not shown any progress D *by way of rehabilitation — Whether latest application for JM was fatal for not satisfying pre-conditions in ss 404 and 407(1) of Companies Act 2016 for grant of JM order — Whether evidence showed real purpose of JM application was to take advantage of statutory moratorium that arose upon such application being made to stave off legal action from creditors rather than to rehabilitate the company* E *— Whether court had inherent jurisdiction/power to strike out the JM application on its own volition on finding that it was an abuse of process*

The proposed intervener in this proceeding ('Balaranee') was an unsecured creditor of Emrail Sdn Bhd ('Emrail'). Between 2019 and 2024, Emrail had F more than once broken its agreements with Balaranee to settle the latter's debt. On 8 April 2024, just three days after Balaranee issued a notice of winding up to Emrail under s 466(1) of the Companies Act 2016 ('the CA'), the applicant herein ('Novabrite') applied to the High Court under s 404 of the Companies Act 2016 to place Emrail under a judicial management order ('JMO') and to G appoint one Adnan Hasbi ('Hasbi') as the judicial manager ('JM'). Balaranee applied to intervene in the judicial management application ('JMA') and sought leave under s 410(c) of the CA to retrospectively validate a winding up petition ('Petition 249') it had filed against Emrail on 6 May 2024 and to proceed with the hearing of the same. Balaranee claimed that the instant JMA H was an abuse of process to take advantage of the automatic moratorium that arose upon the filing of a JMA to preclude creditors from taking legal action against Emrail to recover their debts, or, in this case, to proceed with Petition 249. The evidence disclosed that the instant JMA was the sixth such application that was filed by various third parties for Emrail's benefit over a I four-year period.

Held, dismissing the instant JMA, allowing Balaranee's intervention application and granting it retrospective leave under s 410(c) of the CA to validate the filing of Petition 249 and ordering that no further application for

a JMO under s 404 of the CA or for a restraining order under s 368(1) of the CA shall be filed by any party (including Emrail) for Emrail's benefit except with leave of court and after full disclosure of all matters that might affect the court's decision on such application:

(1) The filing of the JMA in the instant case was an abuse of process (see para 124).

(2) Novabrite had failed to discharge the burden of showing that the JMA was bona fide and that the pre-conditions under s 404 of the CA and s 407(1) of the CA had been met. The evidence showed that the JMA was not filed bona fide with the predominant purpose of rehabilitating Emrail; rather, it was an abuse of process, filed instead for the predominant purpose of staving off legal proceedings against Emrail, in particular, Petition 249 (see paras 97–98).

(3) Evidence of abuse of process included the following: (a) the very timing of the filing of the JMA on 8 April 2024 appeared to be in direct response to Balaranee's winding up notice dated 5 April 2024. Such timing strongly suggested, if not proved, that the predominant purpose of filing the JMA was to stave off the winding up proceedings by Balaranee; (b) the failure to satisfy the statutory pre-conditions in s 404 of the CA and s 407(1) of the CA was fatal to the instant JMA. Novabrite failed to put forth any proposal for the rehabilitation of Emrail and also failed to show that Hasbi was properly nominated as a JM under s 407(1) of the CA. There was no evidence to show that Hasbi was an 'insolvency practitioner' as required by the CA. His liquidator's licence was not produced. The failure to properly nominate a JM in a JMA was an unforgivable mistake if rehabilitation was the true purpose of the JMA; (c) despite Emrail having gone under five successive JMOs before the instant JMA, there was nothing to show that any progress had been achieved towards the rehabilitation of the company. The affidavits filed by Novabrite as the applicant in the fourth, fifth and the instant JMAs were similar and in parts, identical. Such similar affidavits showed that there had been no progress in JMA4 to JMA6. There was no evidence of any proper nomination of a JM over the previous four years when Emrail was under successive JMOs. There was no other evidence to show any real effort, progress or steps that had been taken to rehabilitate Emrail including the development of any proposal or negotiations with creditors. There was no disclosure of all material facts including the requisite financial information to show that s 404(b) of the CA had been complied with and to show how Emrail could be rehabilitated. Also, in the four years that Emrail was under successive JMOs, no reasons were given for not calling creditors' meetings (see paras 58, 60–61, 66, 72, 100, 102–103, 105, 109 & 118–120).

(4) Based on the need to protect the administration of justice and to ensure that its procedure was not misused, the court had a duty, and not merely the discretion, to strike out the JMA on its own volition if the filing of the JMA was found to be an abuse of process. This power to strike out was exercisable *ex proprio motu* even though parties had not applied for such relief. Alternatively, appropriate relief might also be granted under s 405(4) of the CA on an unsuccessful s 404 application if the court considered that it was vexatious and frivolous (see paras 145, 147–149 & 155).

(5) Although Petition 249 was filed during the moratorium, the same was not rendered a nullity and, in an appropriate case, the court had power under s 410(c) of the CA — which power was derived from the court's inherent jurisdiction — to grant retrospective leave to validate the filing of the said petition. Balaranee had expended time and costs in preparing for the hearing of Petition 249 and would suffer hardship if leave was not granted to validate the petition. Nothing would be achieved by making Balaranee file a fresh winding up petition (see paras 46 & 167–170).

[Bahasa Malaysia summary

Pencelah yang dicadangkan dalam prosiding ini ('Balaranee') adalah pemiutang tidak bercagar Emrail Sdn Bhd ('Emrail'). Antara tahun 2019 dan 2024, Emrail telah beberapa kali melanggar perjanjiannya dengan Balaranee untuk menyelesaikan hutangnya. Pada 8 April 2024, hanya tiga hari selepas Balaranee mengeluarkan notis penggulungan kepada Emrail dibawah s 466(1) Akta Syarikat 2016 ('AS'), pemohon di sini ('Novabrite') memohon kepada Mahkamah Tinggi di bawah s 404 Akta Syarikat 2016 ('AS') untuk meletakkan Emrail di bawah perintah pengurusan kehakiman ('PPK') dan melantik Adnan Hasbi ('Hasbi') sebagai pengurus kehakiman ('PK'). Balaranee memohon untuk mencelah dalam permohonan pengurusan kehakiman ('PPK') dan memohon kebenaran di bawah s 410(c) AS untuk petisyen penggulungan diberikan secara retrospektif ('Petisyen 249') yang telah difailkan terhadap Emrail pada 6 Mei 2024 dan didengar bersama. Balaranee menyatakan bahawa PPK ini adalah penyalahgunaan proses dan untuk mengambil kesempatan daripada moratorium automatik selepas pemfailan PPK untuk menghalang pemiutang daripada mengambil tindakan undang-undang terhadap Emrail untuk mendapatkan semula hutang mereka, atau dalam kes ini untuk meneruskan Petisyen 249. Keterangan mendedahkan bahawa PPK ini adalah permohonan keenam yang difailkan oleh pelbagai pihak ketiga untuk kepentingan Emrail dalam tempoh empat tahun.

Diputuskan, menolak permohonan pengurusan kehakiman ini, membenarkan permohonan mencelah Balaranee dan membenarkan kebenaran restropektif dibawah s 410(c) AS untuk mengesahkan pemfailan Petisyen 249 dan memerintahkan bahawa tiada permohonan lanjut untuk

PPK dibawah AS untuk perintah halangan di bawah s 368(1) AS difailkan oleh sebarang pihak (termasuk Emrail) untuk kepentingan Emrail kecuali dengan kebenaran mahkamah dan setelah pendedahan penuh untuk semua perkara yang mungkin menggangu keputusan mahkamah untuk permohonan sedemikian:

(1) Permohonan pengurusan kehakiman di dam kes ini adalah penyalahgunaan proses (lihat perenggan 124).

(2) Novabrite telah gagal melepaskan beban untuk menunjukkan bahawa permohonan pengurusan kehakiman adalah bona fide dan bahawa pra-syarat di bawah s 404 AS dan s 407(1) AS telah dipenuhi. Keterangan menunjukkan bahawa permohonan pengurusan kehakiman tidak difailkan secara bona fide dengan tujuan utama untuk memulihkan Emrail; sebaliknya, merupakan penyalahgunaan proses yang difailkan untuk tujuan utamanya untuk menghalang prosiding undang-undang terhadap Emrail, khususnya melalui Petisyen 249 (lihat perenggan 97–98).

(3) Penyalahgunaan proses boleh dilihat berdasarkan keterangan berikut: (a) masa pemfailan PPK adalah pada 8 April 2024 selepas notis penggulungan Balaranee bertarikh 5 April 2024 difailkan. Tempoh masa tersebut sangat jelas menunjukkan bahawa tujuan utama memfailkan JMA adalah untuk menghalang prosiding penggulungan oleh Balaranee; (b) kegagalan untuk memenuhi pra-syarat statutori menurut s 404 AS dan s 407(1) yang menjejaskan permohonan pengurusan kehakiman ini. Novabrite gagal mengemukakan sebarang cadangan untuk pemulihan Emrail dan juga gagal menunjukkan bahawa Hasbi telah dicalonkan dengan betul sebagai PK menurut s 407(1) AS. Tiada keterangan yang menunjukkan bahawa Hasbi adalah 'pengamal insolvensi' seperti yang dikehendaki oleh AS. Lesen pelikuidasinya tidak dikemukakan. Kegagalan untuk mencalonkan PK dengan betul dalam permohonan pengurusan kehakiman adalah satu kesilapan yang tidak boleh dimaafkan sekiranya pemulihan adalah tujuan sebenar permohonan pengurusan kehakiman; (c) walau pun Emrail telah berada di bawah lima PPK berturut-turut sebelum permohonan pengurusan kehakiman, tiada sebarang usaha dilakukan ke arah pemulihan syarikat. Afidavit yang difailkan oleh Novabrite sebagai pemohon dalam permohonan pengurusan kehakiman keempat, kelima dan ini adalah serupa dan sebahagiannya sama. Afidavit serupa menunjukkan bahawa tiada kemajuan dalam permohonan pengurusan kehakiman keempat hingga keenam. Tiada keterangan menunjukkan sebarang pencalonan PK yang betul dalam tempoh empat tahun sebelumnya apabila Emrail berada di bawah PPK berturut-turut. Tiada keterangan lain yang menunjukkan sebarang usaha, kemajuan atau langkah sebenar yang telah diambil untuk memulihkan Emrail termasuk sebarang cadangan atau rundingan

dengan pemiutang. Tiada pendedahan semua fakta material termasuk maklumat kewangan yang diperlukan untuk menunjukkan bahawa s 404(b) AS telah dipatuhi dan menunjukkan bagaimana Emrail boleh dipulihkan. Selain itu, dalam empat tahun Emrail berada di bawah PPK berturut-turut, tiada alasan diberikan kerana tidak memanggil mesyuarat pemiutang (lihat perenggan 58, 60–61, 66, 72, 100, 102–103, 105, 109 & 118–120).

(4) Berdasarkan keperluan untuk melindungi pentadbiran keadilan dan untuk memastikan prosedurnya tidak disalahgunakan, mahkamah mempunyai kewajipan dan bukan semata-mata budi bicara, untuk membatalkan permohonan pengurusan kehakiman atas kuasanya yang tersendiri sekiranya pemfailan permohonan ini didapati sebagai penyalahgunaan proses. Kuasa untuk membatalkan permohonan ini boleh dilaksanakan secara *ex proprio motu* walaupun pihak-pihak tidak memohon relif tersebut. Sebagai alternatif, relif yang sesuai juga boleh diberikan di bawah s 405(4) AS pada permohonan s 404 yang tidak berjaya sekiranya mahkamah menganggap bahawa ianya menjengkelkan dan remeh (lihat perenggan 145, 147–149 & 155).

(5) Walaupun Petisyen 249 telah difailkan semasa moratorium, perkara yang sama tidak dibatalkan dan dalam kes yang sesuai, mahkamah mempunyai kuasa di bawah s 410 (c) AS — menurut bidang kuasa yang wujud di mahkamah — untuk memberikan kebenaran retrospektif untuk mengesahkan pemfailan petisyen tersebut. Balaranee telah menghabiskan masa dan kos dalam persediaan untuk pendengaran Petisyen 249 dan akan mengalami kesukaran sekiranya kebenaran tidak diberikan untuk mengesahkan petisyen itu. Tiada sebarang hasil sekiranya Balaranee memfailkan petisyen penggulungan yang baru (lihat perenggan 46 & 167–170).]

Cases referred to

Ace Holdings Bhd v Lukman Hakimi bin Abdullah (trading under the name and style of LH Million Resources) [2023] MLJU 645, HC (refd)

AGPS BondCo plc Strategic Value Capital Solutions Master Fund LP and others, Re v AGPS BondCo plc [2024] EWCA Civ 24, CA (refd)

Airasia X Bhd v BOC Aviation Ltd & Ors [2021] 10 MLJ 942, HC (refd)

Andy Farouk Muhamad Nasim v Small Medium Enterprise Development Bank Malaysia Bhd & Ors and another case [2021] MLJU 2146, HC (refd)

Ashby v Slipper; Harmer v Slipper (2014) 312 ALR 551, FC (folld)

Attorney-General v Times Newspapers Ltd and another [1992] 1 AC 191, HL (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd [2021] MLJU 310, HC (refd)

Biaxis (M) Sdn Bhd, Re v TNB Repair Management Sdn Bhd & 2 Ors [2022] 7 MLJ 443, HC (refd)
BTI 2014 LLC v Sequana SA and others [2022] 3 WLR 709, SC (refd)
CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor [2019] MLJU 148, CA (folld)
Conweld Engineering Sdn Bhd & Ors v Goh Swee Boh @ Goh Cheng Kin & Anor [2019] MLJU 1359, HC (folld)
Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307, HL (refd)
Dynawell Corporation (M) Sdn Bhd v Universal Trustee (M) Berhad (proposed intervener) [2013] CLJU 1391, HC (refd)
Facilipack Industries Sdn Bhd, Re [2019] MLRHU 1931 (refd)
Federal Power Sdn Bhd v Dara Consultant Sdn Bhd [2022] 7 MLJ 563, HC (folld)
Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)
Gigatech Engineering Sdn Bhd v EnGreen Sdn Bhd (formerly known as 'EG Chemicals & Engineering Sdn Bhd') [2023] 11 MLJ 457, HC (refd)
Goldpage Asset Sdn Bhd v Unique Mix Sdn Bhd [2020] MLJU 723, HC (refd)
Governor and Company of the Bank of Ireland and another v Colliers International UK plc (in administration) and others [2013] Ch 422, Ch D (refd)
Han Yeow Ming & Ors v Yu Chan Trading Sdn Bhd (in receivership) (Malayan Banking Bhd, secured creditor) [2022] MLJU 596, HC (refd)
Hartley Poynton Ltd v Ali (as executor and trustee of the estate ALI) [2005] VSCA 53, SC (refd)
Hunter v Chief Constable of West Midlands Police and other respondents (on appeal from McIlkenny v Chief Constable of the West Midlands) [1982] AC 529, HL (refd)
Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)
Lim Chee Kuo v The Pacific Bank Bhd [2011] 5 MLJ 230, CA (refd)
Maju-TH Sdn Bhd (Lembaga Tabung Haji, proposed intervener) [2025] 8 MLJ 875, HC (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (folld)
Malaysia Building Society Bhd v Mohd Zainuddin bin Omar & Anor [2019] MLJU 1354, HC (refd)
Mansion Properties Sdn Bhd v Sham Chin Yen & Ors [2021] 1 MLJ 527, FC (refd)
Maybank Investment Bank Bhd & Ors v Million Westlink Sdn Bhd (21 July 2020) (unreported), CA (refd)
Moses Bartholomew v Sivanesan a/l Achalingam & Ors [2013] 8 MLJ 232, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)

Pengangkutan UFO Sdn Bhd v Hap Seng Credit Sdn Bhd & Ors [2023] 11 MLJ 42, HC (refd)

Protocol for the control and management of heavy fraud and other complex criminal cases [2005] 2 All ER 429, CA (refd)

PNL Capital Sdn Bhd & Ors v Loh Teck Wah & Ors [2022] 6 MLJ 304, CA (refd)

Sapura Energy Bhd & Ors v Enersafe Resources Sdn Bhd (Originating Summons No WA-24NCC-121–03 of 2023) (unreported) (refd)

Sapura Energy Bhd & Ors v LPL Project & Logistics (M) Sdn Bhd & Ors (Originating Summons No WA-24NCC-121–03 of 2023) (unreported) (refd)

Sapura Energy Bhd & Ors v Martin Bencher (M) Sdn Bhd [2024] MLJU 65, HC (refd)

Secretary of State for Trade and Industry v Baker and others [1998] Lexis Citation 1501, Ch D (refd)

Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners) [2023] 7 MLJ 399, HC (refd)

Tan Aik Ling v CT World Construction Sdn Bhd and another suit [2024] MLJU 2479, HC (refd)

Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 236(3)

Companies Act 2016 ss 2, 366, 368, 368(1), (2), 404, 404(b), 405, 405(1)(b), (1)(b)(iii), (2), (4), 407(1), 410, 410(a), (b), (c), 420, 466(1), 470(1), 486(2)

Companies (Corporate Rescue Mechanism) Rules 2018 r 9

Insolvency Act 1967 ss 2D(2)(b), 2F

Rules of Court 2012 O 15 r 6(2), O 18 r 19 , O 32, O 32 r 13, O 92 r 4

Irwin Lo (Lo Chambers) for the applicant.
Ooi Suan Kim (OS Kim & Assoc) for the respondent.
S Naveen (S Ravenesan) for the proposed intervener.

Saheran Suhendran JC:

INTRODUCTION

[1] This is a case of an abuse of process of court caused by the filing of an application for a judicial management order under s 404 of the Companies Act 2016 ('the CA 2016'), and the steps a court may take to cure it.

BACKGROUND FACTS

[2] On 8 April 2024, the applicant ('Novabrite') filed an application in encl 1 ('JMA6') for an order ('JMO') under s 404. The proposed JMO was for the respondent, Emrail Sdn Bhd ('Emrail'), to be placed under judicial management. Encik Adnan Hasbi (NRIC No 780917–08–5799) ('Hasbi') was nominated as the proposed judicial manager ('the JM').

[3] On 27 June 2024, an application ('NoA leave' or 'encl 14') was filed by the proposed intervener ('Balaranee'). It is supported by the affidavit of Balasubramaniam a/l M Veerappan affirmed on 27 June 2024 ('encl 15').

[4] On 1 July 2024, NoA leave and (encl 15) were served on Emrail. In encl 15, Balaranee made several serious allegations against Novabrite in relation to multiple JMAs filed over a period of approximately four years. It was alleged that the JMAs were an abuse filed to take unfair advantage of the automatic moratorium arising on the filing of a JMA (para 40 (ii)) and were a tactical ploy to preclude genuine creditors such as Balaranee from initiating action to recover their debts (paras 41 and 44). Balaranee wanted leave to proceed with winding up proceedings filed by it against Emrail vide Companies (Winding Up) Petition Number No BA-28NCC-249–05 of 2024 ('Petition 249') filed on 6 May 2024 (para 45).

[5] No affidavits in reply were filed by Novabrite or Emrail. I am surprised that Novabrite just sat back and let these factual allegations go unanswered given the attacks on the bona fides of its own application in JMA6. Such inaction can only be taken as deliberate as no explanation for the non-response was given. I agree with counsel for Balaranee that following the Court of Appeal's decision in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 86, the failure to contradict such allegations will be taken as an admission of those allegations.

[6] Indeed, the evidence suggests that throughout the early stages of this JMA6 including steps taken in the filing of affidavits, written submissions and at the early hearing dates for NoA leave, Emrail played little or no part. Emrail did not file an affidavit in response to encl 15 except that an 11th hour attempt was made to obtain permission to file such an affidavit (see paras 9 to 18 below). The evidence suggests that Emrail played no part in any of the first five JMAs.

[7] NoA leave was originally fixed for decision on 9 September 2024. I noted from Balaranee's submissions, counsel raised the issue that the filing of successive JMAs triggering the automatic moratoria for a substantial period, was an abuse of process.

[8] This concerned me. I requested for further submissions on the abuse issue. On 30 August 2024, Novabrite filed encl 45 and Balaranee filed encl 47. I adjourned the date for decision to 3 October 2024.

Emrail finally enters the fray

[9] In an unexpected move after these final written submissions by Balaranee and Novabrite were filed on 30 August 2024 and affidavits closed, Emrail filed a notice of appointment of solicitors (M/s OS Kim & Associates) dated 12 September 2024. By a letter dated 20 September 2024, M/s OS Kim (as solicitors for Emrail) wrote to court stating that they intended to attend the hearing on 3 October 2024 and object to NoA leave. They asked for directions.

[10] On 23 September 2024, M/s S Ravenasan, solicitors of Balaranee, wrote to court objecting to M/s OS Kim's request given that NoA leave and encl 15 were served on Emrail as early as 1 July 2024, and there was after a considerable delay. It is noted that this was after a second decision date was fixed on 3 October 2024.

[11] They also drew attention to O 32 of the Rules of Court ('the ROC'). I took this reference to be a reference to the time for filing a response to encl 15. It is a fair point. By O 32 r 13, Emrail had 14 days to reply to encl 15 which was served on 1 July 2024, that is, before 15 July 2024.

[12] M/s OS Kim's request in their letter of 19 September 2024 was referred to me. I was reluctant to allow it given the delay and the prospect of losing the decision date. But in the end, I capitulated and allowed them to be heard as Emrail is, after all, the named respondent.

[13] But I added a proviso: that their written submissions were to be filed sufficiently early so that the hearing date of 3 October 2024 would not be preserved. The Registrar at the case management by e-review on 24 September 2024 ('CM') gave directions that Emrail's submissions on NoA leave be filed by 30 September 2024, as the decision was fixed for 3 October 2024. Emrail filed encl 56 dated 26 September 2024.

[14] However, Emrail's request to file an affidavit in reply to encl 15 was denied. The circumstances behind the request are these. Enclosure 15 was served on Emrail as early as 1 July 2024. The decision date was originally fixed for 9 September 2024 and then adjourned to 3 October 2024. There was considerable delay from 1 July 2024 (date of service) until 24 September 2024 (date of request at the CM) to ask for permission to file an affidavit in reply. No application for an extension of time was made nor was there any reason given for the delay. A mere oral request at the CM on 24 September 2024 to file an

affidavit days was not enough. If granted, it would mean Balaranee would have a right of reply and the hearing on 3 October 2024 would inevitably be lost. The decision rejecting the request to file an affidavit on 24 September 2024 was plainly correct.

[15] This is not the first time that Emrail tried to interfere in a JMA which would have led to the hearing date thereof being vacated. In JMA5, Emrail again, choose not to participate until the 11th hour at the second decision date, when a representative of Emrail (not a solicitor) appeared asking for an adjournment to allow Emrail an opportunity to obtain legal representation. Justice Murad (who heard JMA5) denied the adjournment as, in this view, the request was simply made too late. His Lordship also dismissed JMA5 on the basis that there was no nomination of a JM under s 407(1); this is confirmed by Novabrite at para 15 of encl 2.

[16] In this JMA6, on the decision date on 3 October 2024 (which was also a second decision date), counsel for Emrail complained that Emrail was 'prevented' from filing an affidavit. The complaint rang hollow. Emrail had since 1 July 2024 to file an affidavit in reply but chose not to, deliberately. No one 'prevented' it from doing so. Emrail's request to file an affidavit at the 24 September 2024 CM in JMA6 was again, simply too late, as was the late request to appoint lawyers on the second decision date of JMA5.

[17] I had no hesitation in rejecting counsel's complaint, which generated little sympathy from me. It was Emrail's conduct in JMA5 and JMA6 in not promptly responding to affidavits and taking action expeditiously, that was the cause of its own predicament.

THE NOA LEAVE

[18] By NoA leave, Balaranee sought the following:

(a) leave to intervene in this JMA6 pursuant to O 15 r 6(2) and/or O 92 r 4 of the ROC; and

(b) leave *nunc pro tunc* under s 410(c) of the CA 2016 to continue with Petition 249.

[19] The parties filed written submissions. Novabrite filed encls 28 and 45, Balaranee filed encls 26, 47 and 59. Emrail, after the permission granted at the CM on 24 September 2024, filed encl 57.

[20] The bases of NoA leave are that:

(a) leave to intervene be granted as Balaranee is a creditor of Emrail and its

rights and interests will be materially affected by JMA6, see paras 8, 9 and 20 of encl 26; and

(b) leave under s 410(c) be granted to validate Petition 249 by reason, inter alia, that JMA6 is an abuse of process and that Emrail should be wound up, see paras 11 to 17 of encls 26 and 47.

Prayer 1 — Leave to intervene

[21] The following facts are derived from encl 15 filed by Balaranee. I accepted them as correct given that no affidavits were filed in rebuttal by Novabrite or Emrail (whose 11th hour request to file an affidavit, as explained above, was denied). The exhibit numbers referred to below are those in encl 15.

[22] The facts are these.

[23] Emrail was the main contractor in a project for the restoration of track and slope stabilisation, track rehabilitation and associated works due to a major flood between Gua Musang and Tumpat Railway Station, Kelantan (Package C) ('the project'). Pursuant to an agreement dated 27 March 2017 ('the agreement'), Balaranee was appointed by Emrail to supply labour for the project for 15 months from the date of the agreement. On 21 June 2018, Emrail extended the validity of the agreement until 31 March 2019.

[24] Balaranee continued supplying labour until October 2019. Emrail, however, defaulted in payment.

[25] The outstanding payments from January 2019 until October 2019 were as follows (see exh 'BMV5'):

No	Date	Invoice No	Amount (RM)
1	31 January 2019	IV-00130	72,512.35
2	28 February 2019	IV-00131	208,562.73
3	31 March 2019	IV-00132	241,046.67
4	30 April 2019	IV-00133	341,001.02
5	31 May 2019	IV-00134	357,272.43
6	30 June 2019	IV-00135	273,016.58
7	31 July 2019	IV-00136	330,037.56
8	31 August 2019	IV-00137	253,406.30
9	30 September 2019	IV-00138	256,163.64
10	31 October 2019	IV-00139	82,317.77
TOTAL (RM)			2,415,337.05

[26] As at October 2019, a total sum of RM2,415,337.05 remained owing to Balaranee.

[27] Balaranee's solicitors, M/s S Ravenesan, served a winding up notice dated 5 November 2019 on Emrail pursuant to s 466(1) of the 2016 Act.

[28] After a meeting on 14 November 2019, Emrail proposed a repayment schedule. On 25 November 2019, Balaranee agreed. The repayment schedule was as follows:

No	Payment date	Payment amount (RM)
1	30 November 2019	400,000
2	31 December 2019	320,000
3	31 January 2020	320,000
4	28 February 2020	320,000
5	31 March 2020	320,000
6	30 April 2020	320,000
7	31 May 2020	400,000 (balance after certification of invoices).

[29] The first instalment of RM400,000 was paid on 30 November 2019. As per the agreed repayment schedule, all payments ought to have been made by 31 May 2020. However, Emrail only paid four instalments as follows (see exh 'BMV9'):

No	Payment date	Payment ampunt (RM)
1	30 November 2019	400,000
2	07 January 2020	320,000
3	14 February 2020	100,000
4	06 March 2020	540000
Total amount paid (RM)		1,360,000

[30] Since March 2020, Emrail had not made any payments. As of 19 May 2020, the total sum due and owing by Emrail to Balaranee was RM1,055,337.05, see proposed intervener's summary dated 19 May 2020 at exh 'BMV11'.

[31] From May 2020 till November 2022, Emrail was the beneficiary of multiple judicial management applications ('the JMAs').

[32] On 3 November 2022, M/s S Ravenesan issued another s 466(1) winding up notice to Emrail for the outstanding sum of RM1,055,337.05.

[33] On 15 November 2022, Emrail proposed another repayment schedule which, on 21 November 2022, was agreed to by Balaranee. If adhered to, all payments ought to have been made by 31 December 2023. However, Emrail did not comply, only paying the following (see exh 'BMV15'):

No	Payment date	Payment amount (RM)
1	19 January 2023	50,000
2	10 February 2023	50,000
3	1 March 2023	50,000
4	3 April 2023	50,000
5	5 May 2023	50,000
6	31 May 2023	25,000
7	16 August 2023	25,000
8	13 September 2023	25,000
9	22 September 2023	25,000
Total amount paid (RM)		350,000

[34] On 5 April 2024, M/s S Ravenesan served yet another s 466(1) winding up notice, demanding payment of the balance of RM705,330.

[35] Emrail failed to pay this balance. After the said notice expired (see exh 'BMV16'), Petition 249 was filed on 6 May 2024.

[36] From the above narrative, I am satisfied that Balaranee is a creditor of Emrail.

The hearing on 3 October 2024

[37] At the first hearing of NoA leave on 21 August 2024, counsel for Novabrite had no objections to prayer 1 for leave to intervene.

[38] Novabrite did not dispute that Balaranee was an unsecured creditor of Emrail and did not contradict such averments in encl 15. The failure to rebut encl 15 constitutes an admission of the allegation that Balaranee is a creditor of Emrail, see *Ng Hee Thoong.*

[39] This concession is undoubtedly correct. It is settled that as an unsecured creditor of Emrail, Balaranee has locus to be heard on JMA6, see *Goldpage Asset Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723 and *Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd* [2021] MLJU 310. In *Maybank Investment Bank Bhd & Ors v Million Westlink Sdn Bhd* (21 July 2020) (unreported), the Court of Appeal similarly held that unsecured creditors have sufficient interest to be heard on a JMA:

> We have considered various provisions of the Companies Act 2016 as well as the Companies (Corporate Rescue Mechanism) Rules 2018. We take the faling [sic] position that the unsecured creditors had the right to be heard and oppose the hearing of the judicial management order (JMO).

[40] At the hearing on 3 October 2024, I rejected Emrail's contention that Balaranee, as a creditor, did not have sufficient interest in the JMA because there was no order granting Balaranee leave to intervene (see paras 4 and 6 of encl 57). I found this submission to be baffling as prayer 1 of NoA leave itself prays for leave to intervene.

[41] I allowed prayer 1.

Prayer 2 — Leave nunc pro tunc

Petition 249 and s 410

[42] The filing of this JMA6 by Novabrite on 8 April 2024, appears to be in direct response to the winding up notice dated 5 April 2024 served on Emrail by Balaranee's solicitors some three days earlier. This filing triggered the automatic moratorium under s 410(c) restraining the commencement of winding up proceedings.

[43] But Balaranee filed Petition 249 against Emrail on 6 May 2024 without leave, claiming that it had no knowledge of the filing of JMA6 on 8 April 2024. This meant that Petition 249 was filed in breach of the s 410(c) moratorium. However, such filing may be cured by leave *nunc pro tunc*.

[44] I do accept that the granting of such leave under s 410(c) for Petition 249 (for the winding up of Emrail) is perhaps inconsistent with JMA6, which in contrast, seeks to rehabilitate Emrail. In this context, I also note that s 410(a) prohibits the making of a winding up order in the period from the filing of the JMA until, inter alia, its dismissal. So, it may be argued that JMA6 prevents validating Petition 249.

[45] This is not the case.

[46] The filing of Petition 249 in breach of the moratorium does not render it a nullity; it follows that there is nothing to prevent, as a matter of discretion, leave being granted *nunc pro tunc* under s 410(c) to validate Petition 249, see *Governor and Company of the Bank of Ireland and another v Colliers International UK plc (in administration) and others* [2013] Ch 422 at para 30.

A FAILURE OF STATUTORY PRECONDITIONS

[47] Novabrite has failed to prove that the statutory precondition to nominate a JM in s 407(1), has been met.

B **[48]** The starting point in the analysis are ss 404 and 410. As stated above, the mere filing of an application under s 404 gives rise to an automatic moratorium under s 410, staying all creditors' proceedings against Emrail. This is undoubtedly a draconian remedy. It is a great intrusion on the rights of creditors and claimants alike. But Parliament has, by legislation, chosen to C bestow the benefit of a moratorium on financially troubled companies to allow them a chance to rehabilitate. This is consistent with the priority in insolvency law to rehabilitate ailing companies, see *Maju-TH Sdn Bhd (Lembaga Tabung Haji, proposed intervener)* [2025] 8 MLJ 875 at para 62.

D **[49]** In my judgment, given the draconian effect of an automatic moratorium, it should only come into effect upon strict compliance with any pre-conditions prescribed by the legislation. Compliance cannot be taken lightly. This conclusion on the strictness of proof is supported by the Court of E Appeal in *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] MLJU 148 ('Wellcom'):

> [9] The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be *very drastic*. Thus, the court's consideration at all F stages, that is to say *from the date the application is filed* and from the date of the order, if any is given, must be *based on strict proof and evidence and not merely surmise and conjecture to ensure creditors are not defrauded* by sympathy evoking stories of insolvent companies. (Emphasis added.)

G 1. Section 407(1) — No nomination of a qualified JM proved

[50] The context of the complaint is this. The judicial management procedure dictates that first, there must be an appointment of a JM under s 404. If a JMO is granted, the JM will formulate a proposal under s 420 to H rehabilitate Emrail in accordance with s 405(1)(b).

[51] It cannot be emphasised more strongly that the JM and his proposal is a central feature of the JM rehabilitation process. In *Re Biaxis (M) Sdn Bhd v TNB Repair Management Sdn Bhd & 2 Ors* [2022] 7 MLJ 443, the I importance of the JM and his proposal was explained thus:

> [14] I am of the firm opinion that the application should also be supported by the *nominated* judicial manager for the following reasons: (a) he is the mastermind behind the proposal and plays a *key role* throughout the judicial management process; (b) he has the expertise to consider whether the proposal will achieve

survival and/or better realisation; (c) he is able to provide an objective view, being a professional without any vested interest in the applicant or company; and (d) for as much as it is applicant's application for a judicial management order, it is also his application albeit indirectly to be appointed judicial manager.

[15] To this end, I think it incumbent on him to affirm an affidavit to support the application. At the very least (though not encouraged), he should prepare an expert report to support the application, to be appended to the applicant's affidavit. (Emphasis added.)

[52] The JM is thus the expert who will formulate and implement his proposal to rehabilitate Emrail.

[53] However, I do not go so far as to hold that the proposal is a pre-condition and must be filed together with a s 404 application before the moratorium takes effect. By s 420, a proposal is only required within 60 days after the making of the JMO. I agree with the similar conclusion reached by Nadzarin Wok Nordin JC (as he then was) in *Federal Power Sdn Bhd v Dara Consultant Sdn Bhd* [2022] 7 MLJ 563 at paras 23 and 24. But see *Gigatech Engineering Sdn Bhd v EnGreen Sdn Bhd (formerly known as 'EG Chemicals & Engineering Sdn Bhd')* [2023] 11 MLJ 457 at (headnote 4) at paras 43 to 49 where the JMA was struck out before a JMO was made; it was found that the proposal submitted was deeply flawed. However, the case is best explained on the basis that the decision striking out the JMA was because it was an abuse designed to stall the hearing of a winding up petition fixed the week after, see para 55 thereof.

[54] However, as noted in *Federal Power v Dara Consultant* (at para 24 thereof) and *Biaxis* (at para 15 thereof), an affidavit by the proposed JM would be helpful at the hearing of the JMA. I too agree, that although not strictly required, a draft proposal of some sort would be of great assistance. For example, it will help the court determine (if this ground is relied on) whether s 405(1)(b) and (2) is met, ie, whether the court is satisfied that the JMO will likely achieve the survival of the company.

[55] However, the absence of a proposal may still, in all the circumstances, be evidence of a collateral purpose or abuse.

Mandatory compliance and Hasbi

[56] In respect of the nature of the statutory preconditions, *Andy Farouk Muhamad Nasim v Small Medium Enterprise Development Bank Malaysia Bhd & Ors and another case* [2021] MLJU 2146 is helpful. It concerned an application by a debtor for an interim order for a proposal for voluntary arrangement. The application was made under ss 2D(2)(b) and s 2F of the

Insolvency Act 1967. The sections provide that the nominee must be willing to act in relation to the proposal and must be registered with the Director General of Insolvency. These provisions were not met.

[57] The court dismissed the application on the basis that the nominee provisions are mandatory by reason of the use of the word 'shall' in the sections, see paras 13 and 14 thereof.

[58] Similarly, in relation to s 407(1), I find that it is a statutory pre-condition to the *filing* of a JMA that there 'shall' be a nomination of a JM who must be an insolvency practitioner (defined in s 2 as a person with a liquidator's licence). Section 407(1) provides:

> 407 Nomination of judicial manager
>
> (1) In any application for a judicial management order under section 404, the applicant *shall* nominate a person who is an insolvency practitioner, who is not the auditor of the company, to act as a judicial manager. (Emphasis added.)

[59] As with *Ahmad Farouk,* I find that the word 'shall' in s 407(1), makes it mandatory in a s 404 application, to nominate an insolvency practitioner as a JM. This is hardly surprising given the central role the JM plays in the process, see para 51 above.

[60] By prayer 2 of encl 1 and para 19(a) of encl 2, Hasbi was nominated as the JM. The burden is on Novabrite (as the applicant in JMA6) to show that Hasbi was properly nominated under s 470(1), see para 76 below. However, no evidence was led showing that he was an 'insolvency practitioner' within s 2. His liquidator's licence was not produced.

[61] As such, I find that Novabrite has not discharged the burden of proving that a proper nomination of a JM was made under s 407(1). The filing of JMA6 was defective.

2. Section 404 — No substantiated belief

[62] Section 404 provides as follows:

> 404. An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that —
>
> (a) the company is or will be unable to pay its debts; and
>
> (b) there is a *reasonable probability of rehabilitating* the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up. (Emphasis added.)

[63] In *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473 at para 26 and in *Biaxis* (at para 5 thereof), it was held that s 404 contains a precondition to the very filing of a valid application. This is that the applicant must '*consider*' that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

[64] In *Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners)* [2023] 7 MLJ 399, the distinction between the thresholds in ss 404 and 405 was examined.

> [6] It is to be observed that read collectively and as a whole, the express words in the above said ss 404 and 405(1) and (2) of the Companies Act 2016 was framed by Parliament for the benefit of the company ie in this case the respondent, in that the company or its creditors have *to consider* under s 404 that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up, whilst under s 405 the court must consider the court considers that the making of the order would be *likely to achieve* one or more of the following purposes the survival of the company, or the whole or part of its undertaking as a going concern; (Emphasis added.)

[65] The difference is immaterial in this case. It is the precondition to the filing of a s 404 application that matters. In our context (as contended by Novabrite), the company must 'consider' (I take to mean 'believe') that there is a reasonable probability of rehabilitating Emrail.

[66] In support of a s 404 application, there must, at the very least, be a statement that the applicant 'considers' that there is a reasonable probability of rehabilitating the company, see *Biaxis* (at para 26 thereof). A bare statement, however, is not enough. It must be supported with real evidence. This is necessary as the preconditions to trigger the draconian moratorium must be strictly complied with (see *Welcom* and para 49 above).

[67] I do not intend to define the criteria and evidence that would satisfy a s 404 application, in our case, that Novabite 'considers' that there is a reasonable probability of rehabilitating Emrail. 'Rehabilitating', in my mind, means a return to solvency whereby the company will be able to carry on business in the future as a going concern, see paras 71 to 73 of *Maju TH*. This will go towards showing bona fides of JMA and following *Wellcom,* must be shown in the application itself.

[68] As a matter of principle, this means (in my layman's terms) that post JMO, the company must be able to generate enough operational or internally generated cashflow to meet all its liabilities, including any restructured liabilities and operational costs. This involves some analysis of the financial position and future business of Emrail and therefore, disclosure of its financial position is necessary. I say no more than that; nor will I comment in detail on the type of evidence that should be disclosed.

[69] But what I can say is that the evidence led in JMA6 is wholly insufficient to satisfy the s 404 pre-condition.

[70] The actual evidence led in encl 2 is as follows. In para 17, Nobabrite merely makes a bare statement that there were ongoing projects and there are further projects at the bidding stage. Paragraph 18 merely states that the deponent was advised by its 'solicitors' that there is a reasonable probability to preserve Emrail's business as a going concern, and that the interests of the creditors would be better protected than in a winding up of Emrail. I assume these 'solicitors' are Novabrite's solicitors on record. First, this statement is unsubstantiated and simply lifted from s 404 itself. Secondly, solicitors cannot provide such financial advice, nor are they qualified to do so. No other documents or evidence were adduced.

[71] The evidence led in encl 2 is nothing more than unsubstantiated bare statements. It is well short of proving compliance with the s 404 pre-condition within the Court of Appeal's strict approach in *Wellcom*.

[72] I therefore find that the pre-conditions in both ss 407(1) and 404 have not been met. This is fatal to JMA6.

ABUSE OF PROCESS

[73] Balaranee claims that JMA6 was filed without bona fides and for the collateral purpose of shielding Emrail from legal proceedings. The automatic moratoria were obtained for the benefit of Emrail on the filing of six successive JMAs. As at the date of decision on encl 14 on 12 November 2024, the moratoria lasted approximately 1,486 days or about four years in total, see the table below:

No	Case No	Applicant	Filing date	Solicitors on record	Withdrawal date	Withdrawal reason
1	WA-28JM-17–07 of 2020 ('JMA1')	Balaranee Construction (proposed intervener)	22 July 2020	S Ravenesan	4 February 2021 (197 days)	Court dismissed with liberty to file afresh
2	WA-28JM-3–02 of 2021 ('JMA2')	Zabima Engineering and Construction Sdn Bhd	4 February 2021	Lo Chambers	20 August 2021 (197 days)	Parties agreed to withdraw (see pp 352–353 of encl 15.)
3	BA-28JM-15–08 of 2021 ('JMA3')	Parushan Winpoint Sdn Bhd	16 August 2021	Mohamad Ibrahim, Ganapathy & Associates	1 November 2022 (442 days)	OS dismissed by Azmi Ariffin J
4	WA-28JM-21–12 of 2022 ('JMA4')	Novabrite Lighting Sdn Bhd	2 December 2022	MK Chen & Leong	20 January 2023 (49 days)	Settlement (see pp 354–355 of encl 15.)
5	WA-28JM-8–03 of 2023 ('JMA5')	Novabrite Lighting Sdn Bhd	28 March 2023	MK Chen & Leong	25 March 2024 (364 days)	Murad J dismissed — no JM nominated (see para 15 of encl 2.)
6	WA-28JM-14–04 of 2024 ('JMA6')	Novabrite Lighting Sdn Bhd	8 April 2024	Lo Chambers	As at 12 November 2024 (219 days)	

[74] Plainly, in this JMA6, Balaranee (the applicant in JMA1 also supported JMA3) has had a change of heart, now attacking JMA6 broadside. I will deal with this change of position later.

ABUSE — THE BURDEN AND TEST

The burden

[75] As a starting point, the Court of Appeal has held that an application under s 404 must be made bona fide, see *Wellcom* at para 15:

> [15] In the instant case, we have demonstrated that there is an abuse of process of court and the learned judicial commissioner ought to have dismissed the stay application in limine. This moratorium regime related to s 404 of the CA 2016 should not in the first instance be entertained *if the element of bonafide is not reflected in the application*. (Emphasis added.)

[76] I take this to mean that the burden of showing bona fides lies with the applicant which *bone fides*, must be shown in the application itself. This includes showing compliance with the preconditions in s 404, see *Pengangkutan UFO Sdn Bhd v Hap Seng Credit Sdn Bhd & Ors* [2023] 11 MLJ 42 at para 27. And with full and frank disclosure, see *Syed Ibrahim & Co v Trans Fame*:

> [14] That being said, *any applications, including subsequent JM* applications, under the judicial management provisions of the Companies Act 2016 must necessarily comply with all the requirements of the said Act as aforementioned. It also goes without saying that in any judicial management applications, including subsequent JM applications in particular, such applications must be made *bona fide* and with *full and frank disclosure* of all the material facts pertaining to the company, and it is for the applicant to satisfy the burden of proof on a balance of probabilities to the court that the requirements under the Companies Act 2016 have been not only complied with but also the criterias therein fulfilled. It will then be a question of deciding each case on the merits of the case before the court in the *subsequent JM application* based on a case to case basis whilst ensuring that at all times there has been *no abuse of the court* process in doing so. (Emphasis added.)

The test

[77] The test for whether proceedings are an abuse is as stated by the Federal Court in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. Gopal Sri Ram JCA had this to say at p 434:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a *collateral purpose*, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an

action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:

> In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when *it is diverted from its true course* so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. *The judge scan and will intervene to stop it*. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process ...

At other times, the abuse can only be shown by *extrinsic evidence* that the legal process is being used for an improper purpose. On the face of it, in any particular case, the *legal process may appear to been entirely proper* and correct.

What may make it wrongful is the *purpose* for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law. (Emphasis added.)

[78] Further, in the context of the tort of abuse of process, His Lordship in dealing with what amounted to an abuse (which I hold, applies generally) said:

> ... (ii) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the *dominant purpose* for which the process was invoked must be collateral, that is to say, aimed at producing *a result not intended by the invocation of the process*; (Emphasis added.)

[79] The dominant or predominant purpose standard was applied extensively in *Ashby v Slipper; Harmer v Slipper* (2014) 312 ALR 551 (at para 155 below).

[80] In *Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259, Mahadev Shanker JCA said:

> [57] ... At pp 585–586, Lord Bridge stated:
>
> > Counsel for the defendants relied, in support of the submissions which I have summarized in paras 1 and 2 above, on the dictum of Evershed MR in *Re Majory* [1955] 2 All ER 65 at p 78:
> >
> > > The so-called 'rule' in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and *not for the*

> *purpose for which such proceedings are properly designed* and exists; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court, and, therefore, disqualified from invoking the powers of the court by proceedings he has abused.
>
> ... (Emphasis added.)

[81] As I see it, the test is this. When the dominant or predominant purpose for which the court's process was initiated was for a purpose other than that for which the court process was designed, or if proceedings were not initiated for the relief afforded by such process, then such proceedings were initiated for a collateral purpose. And the proceedings so initiated are an abuse of process of the court.

ABUSE — JM AND COLLATERAL PURPOSE

[82] The issue is whether JMA6 was filed for a collateral purpose.

The purpose of a JM

[83] The starting point in the analysis is to determine the purpose for which the JM legislative provisions were designed and then determine whether JMA6 was intended to obtain remedies intended by these provisions. The main purpose of such provisions is to rehabilitate ailing companies to ensure their survival. The Court of Appeal in *PNL Capital Sdn Bhd & Ors v Loh Teck Wah & Ors* [2022] 6 MLJ 304 held:

> [54] We must bear in the forefront of our minds that s 405 of the CA 2016 was enacted to revive an insolvent company and allow a professional manager to design a scheme for revival of the company. It has its rehabilitative and restorative properties designed for the purpose of reviving a company in financial distress. Its prophylactic properties should not be abused ...

[84] *Leadmont* (at para 21 thereof) and *Re Facilipack Industries Sdn Bhd* [2019] MLRHU 1931 at para 16, to name a few, also emphasise the rehabilitative objective of a JMA.

[85] However, as an aside, I do note that the purpose of JM proceedings is not confined solely to the rehabilitation of the company. As stated in s 405(1)(b)(iii), one purpose is to achieve a more advantageous realisation of the company's assets than in a winding up.

[86] This ordinarily means a managed sell down of the company's assets to avoid expedited 'fire sale' prices resulting in reduced realisations for the creditors. However, in this scenario, there is no expectation that the company

will be rehabilitated or revived; the managed sale will ordinarily end with the eventual winding up of the company. This type of restructuring has been considered and accepted conceptually in numerous cases, most recently by the Court of Appeal in England in *Re AGPS BondCo plc Strategic Value Capital Solutions Master Fund LP and others v AGPS BondCo plc* [2024] EWCA Civ 24 in the context of a scheme of arrangement. Snowdon LJ said:

> 21. Importantly, the purpose of the proposed restructuring was *not to achieve the long-term survival* of the Group. The proposal was for a controlled wind down of the business and a more beneficial realisation of the assets of the Group than in an immediate formal insolvency. To that end the restructuring offered the Group some new short-term liquidity … It was thought that this would allow the management of the Group time to implement a phased programme of asset disposals during 2025 and 2026, in what was hoped would be a recovering property market, leading to the distribution of *enhanced realisations to creditors* and the liquidation of the Group companies in 2027. (Emphasis added.)

[87] I do not think that the Court of Appeal in *PNL Capital* and the other courts (as stated in para 84 above) meant that rehabilitation was the sole purpose of a JMA. Be that as it may, rehabilitation is the most popular objective and it is, after all, Novabrite's stated objective of JMA6, see para 94 below.

[88] I will proceed on that basis.

The moratorium

[89] That said, the moratorium arising automatically on the filing of a JMA is certainly not the primary objective of JM proceedings. It is only ancillary, to temporarily restrain creditors to allow the company time to achieve the purpose of the JMA, in this case, rehabilitation.

[90] The purpose of a moratorium is much the same as that of a restraining order under s 368 in a scheme of arrangement. A restraining order is also only interim and ancillary, designed to give an ailing company breathing room to implement the primary objective, to restructure under s 366, see the Federal Court in *Mansion Properties Sdn Bhd v Sham Chin Yen & Ors* [2021] 1 MLJ 527 at para 46 thereof.

[91] So, if the moratorium was triggered not merely for an ancillary purpose but for the predominant purpose of staving off creditors (as opposed to genuinely rehabilitating Emrail) then the filing of JMA6 is an abuse, see for example, *Gigatech Engineering* (headnote 4) and *Pengangkutan UFO Sdn Bhd v Hap Seng Credit Sdn Bhd & Ors* [2023] 11 MLJ 42 (filed to delay legal proceedings).

[92] Obviously, multiple or successive applications (whether JMAs or for restraining orders in schemes of arrangement) will be a more severe abuse if filed to stave off creditors.

[93] In *Dynawell Corporation (M) Sdn Bhd v Universal Trustee (M) Berhad (proposed intervener)* [2013] CLJU 1391 the filing of multiple applications for restraining orders in schemes of arrangement, wilfully designed to stave off legal proceedings were found to be an abuse. The extant restraining order was set aside, and the underlying proceedings struck out.

[94] Similarly, in *Han Yeow Ming & Ors v Yu Chan Trading Sdn Bhd (in receivership) (Malayan Banking Bhd, secured creditor)* [2022] MLJU 596 at para 22, multiple JMAs designed to stall winding up proceedings were an abuse. The extant JMA was struck out.

The contrasting submissions

[95] Balaranee claims that JMA2 to JMA6 were filed for the collateral purpose of obtaining the automatic moratoria.

[96] In contradistinction, Novabrite insists that the rehabilitation and survival of Emrail under s 405(1)(b) was the purpose of JMA6 (see para 3 of encl 28; paras 11, 20 and 51 of encl 45). With respect, the evidence suggests otherwise.

ABUSE — THE EVIDENCE

[97] As stated in paras 75 and 76 above, the burden of showing bona fides and that the preconditions of a s 404 application were met, lies with the Applicant, Novabrite. It failed.

[98] The evidence shows that JMA6 was not filed bona fide with the predominant purpose of rehabilitating Emrail. It was an abuse, filed instead for the predominant purpose of staving off legal proceedings, in particular, Petition 249.

[99] The evidence is as follows.

JMA6 to stall winding up proceedings

[100] The very timing of the filing of JMA6 shows that it was filed to stall winding up proceedings.

[101] In *Gigarech Engineering*, it was held that the filing of the JMA just six days before the hearing of the winding up petition was enough to prove the collateral purpose of stalling the hearing of the petition:

> [55] The hearing of the said winding up petition was fixed on 13 June 2022. However, on 7 June 2022, the *applicant filed the present application for judicial management six days before* the hearing date. Hence, it is my considered view that the true intention of filing the present judicial management application is just a tactical manoeuvre and for a collateral purpose of *stalling* the hearing of the winding up petition and also to delay the progress of Suit 112. (Emphasis added.)

[102] Similarly, the filing of JMA6 by Novabrite on 8 April 2024, appears to be in direct response to Balaranee's winding up notice dated 5 April 2024, served just three days before. The moment of filing could not be a coincidence. As with *Gigatech Engineering*, such timing strongly suggests, if not proves, that JMA6 was an abuse filed with the predominant purpose of staving off potential winding up proceedings by Balaranee.

Disregard of the JMA process and bona fides

[103] The failure to satisfy the statutory pre-conditions by itself invalidates JMA6. However, Novabrite's conduct in respect thereto is evidence of its improper motives.

[104] I am reminded that the central feature of a rehabilitation by judicial management is the appointment of a JM and his proposal to rehabilitate (see para 51 above). So, if the predominant purpose of the JMAs was to rehabilitate Emrail, one would rightly expect that Novabrite would be anxious to establish this central feature. However, Novabrite's irreverent approach to satisfying the pre-conditions (such as a nomination of a JM) and in not attempting to cure any defects in the JMAs, is perhaps the most telling evidence that rehabilitation was not the predominant purpose of the JMAs.

[105] Indeed, JMA6 was not the first time Novabrite failed to properly nominate a JM in a JMA, an unforgivable mistake if rehabilitation was the true purpose of the JMAs. Novabrite admits on affidavit that its JM5 was dismissed for failure to nominate a JM (encl 2 at para 15). Indeed, there was also no nomination of a JM in JMA4, see the affidavit in support filed by Novabrite in JMA4. The moratorium improperly invoked by the filing of JMA5 lasted a whole year. This is unacceptable.

[106] Further, in the face of the dismissal of JMA5, Novabrite nevertheless nonchalantly in disregard of the JM provisions, failed to ensure that Hasbi was properly nominated under s 407(1). Insufficient evidence was placed before the court to show compliance with s 404. It was not shown that Hasbi was an

insolvency practitioner with a liquidator's licence (see paras 57 to 62 above). No liquidator's licence was adduced. Typically, as with the appointment of a liquidator, the nominee will ordinarily exhibit his CV and his consent to act. This was not done.

[107] The irreverence towards the nomination process shows that the proponents of JMA6 (and indeed, JMA4 and JMA5) were not really concerned with the appointment of the JM, and it follows, with any rehabilitation plan for Emrail. Such indifference to this critical aspect of the rehabilitation process in a JMA (see para 51 above), shows that the predominant purpose of the JMAs could not have been to rehabilitate Emrail.

[108] Instead, the predominant purpose could only be to trigger the moratoria to stave off creditors. This is consistent with the timing of the filling of JMA6, see paras 100 to 102 above.

No efforts and progress in six successive JMAs

[109] Multiple successive JMAs without any progress shown in rehabilitation and without full disclosure, are more difficult to justify.

[110] Although a fresh JMA may be applied for when the prior JMA lapses, the fresh JMA must be shown to be made bona fide. An explanation for the need for a fresh JMA and the failure of the previous JMA, must be given with full disclosure, see *Syed Ibrahim & Co v Trans Fame* at para 76 above and *Han Yeow Ming* at para 24 thereof.

[111] Similarly, the practice in schemes of arrangement when applying for extensions or for successive 'fresh' restraining orders, requires satisfying much the same criteria. The scheme cases are, however, more developed. In my judgment, the principles in the scheme cases, generally apply to JMAs.

[112] In three decisions involving the debt restructuring of selected companies within the Sapura Energy group ('the *Sapura* cases') through schemes of arrangement, Justice Atan Mustaffa dealt with successive applications for fresh or extensions of restraining orders under s 368 of the CA 2016.

[113] First, in *Sapura Energy Bhd & Ors v Martin Bencher (M) Sdn Bhd* [2024] MLJU 65 (HC), His Lordship held:

> [18] ... The fresh application does not merely extend the previous orders but represents a new phase in the corporate restructuring process, *justified by change sin the restructuring plans* and the financial conditions of the company. This approach is

supported by various legal precedents, including *Pathfinder Strategic Credit LP and Another v Empire Capital Resources Pte Ltd and Another Appeal* [2019] SGCA 29; [2019] 2 SLR 77, a judgment from the Singapore Court of Appeal, which validate the filing of new applications under changed circumstances. In *Pathfinder Strategic Credit LP*, Sundaresh Menon CJ held that there was no abuse merely because there were three prior applications by the company:

> [95] In that light, we consider that there is insufficient evidence in the present circumstances to warrant a finding that Empire Capital's present leave application amounts to an *abuse of process*. Amongst other things, although this is the Berau Group's fourth set of restructuring proceedings in Singapore (see [15] and [16] above), there have been genuine changes in the restructuring plans put forward in the various applications, ...
>
> [19] In other jurisdictions, courts have shown flexibility in allowing fresh applications for convening orders in the context of corporate restructuring schemes, particularly when previous attempts have failed due to various reasons. For instance, in Hong Kong, the case of *Re Century Sun International Ltd* [2022] HKCU 1890 demonstrated this approach when a scheme failure was attributed to inadequate information in the explanatory statement. Similarly, in the UK, the *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch) case allowed a renewed application of an identical scheme after the initial application was marred by the provision of misleading information by the applicant. Moreover, in Australia, the case of *Re Lehman Brothers Australia Ltd (ACN 066 797 760) (in liq) and Others (No 2)* (2013) 95 ACSR 685; [2013] FCA 965 highlighted a scenario where a scheme was abandoned due to the inability to reach a compromise with creditors, yet a fresh application was permitted. These examples illustrate a trend towards accommodating repeated efforts in corporate restructuring, *provided* there are *valid reasons* for the *failure* of initial attempts. (Emphasis added.)

[114] In *Sapura Energy Bhd & Ors v Enersafe Resources Sdn Bhd* (Originating Summons No WA-24NCC-121–03 of 2023) (unreported) at para 23 thereof, His Lordship held that notwithstanding s 368(2), there was no prohibition against applying for fresh convening orders where the new scheme is bona fide after changes and refinements. His Lordship said:

> The court observes that the *draft scheme outline appears to be bona fide*, being presented as genuine and commercially reasonable. Changes and refinements, which can be common in such processes, have precedents such as in *Airasia X Bhd* and *Re Kuala Lumpur Industries Bhd v BOC Aviation Ltd & Ors* [1990] 2 MLJ 180. It is understood that schemes can *evolve* during creditor negotiations. This outline, supervised by the CDRC, has undergone revisions to align with industry standards and stakeholder feedback. The scheme is *not perceived as a way to avoid obligations.* (Emphasis added.)

[115] In *Sapura Energy Bhd & Ors v LPL Project & Logistics (M) Sdn Bhd & Ors* (Originating Summons No WA-24NCC-121–03 of 2023) (unreported) at para 6 thereof, His Lordship found that there was no abuse of

process in filing consecutive scheme applications because the applicants in this case 'have sufficiently *demonstrated through evidence that substantial progress* has been achieved since' the first convening and restraining order and the terms of the 'latest proposed scheme are fundamentally different', in particular with the inclusion of a white knight.

[116] In short, the successive application must be shown to be made bona fide, for valid reasons and with evidence of progress. There must also be an explanation as to why the successive application was required.

[117] These are the facts of Novabrite's successive applications in JMA4 to JMA6.

[118] First, there has been no progress towards rehabilitation:

(a) the affidavits filed by Novabrite in support of JMA 4, JMA5 and JMA6 are similar and in parts, identical (save for the nomination of Hasbi in JMA6). Such similar affidavits show that there has been no progress in JMA4 to JMA6. In fact, counsel for Balaranee submitted that none of the six JMAs over four years bore any fruit towards rehabilitation;

(b) as sated above, there is no evidence of any proper nomination of a JM in over four years during JMA1 to JMA6; this includes the flawed nomination of Hasbi in JMA6;

(c) no other evidence was led to demonstrate any real effort, progress, or any steps to rehabilitate Emrail in JMA4 to JMA6, including the development of any proposal or negotiations with creditors; and

(d) hence, the moratoria enjoyed by Emrail arising from these JMAs cannot be justified by rehabilitative progress and efforts. There were none.

[119] Secondly, there has been no disclosure of all material facts (within *Syed Ibrahim* see para 78 above) including the requisite financial information to show that s 404(b) has been complied with, and to show how Emrail may be rehabilitated.

[120] Thirdly, with respect to the previous successive JMAs, no disclosure was made or explanations given of the following:

(a) why the successive JMA1 to JMA6 were required, within the *Sapura* cases. The details of the previous JMAs would be material to the decision of the court on encl 14 and on JMA6 (encl 1) itself;

(b) why JMA2 and JMA4 were withdrawn at the eleventh hour, see para 40(ii) of encl 15 and why JMA1 to JMA5 failed; and

(c) why, notwithstanding that by r 9 of the Companies (Corporate Rescue Mechanism) Rules 2018 ('the Rescue Rules') a JMA is to be heard within 60 days of filing, no hearing of any JMA was ever held in four years. Also, no reasons were given for not calling creditors' meetings.

This shows that the JM process was not initiated for the final relief for which the JMAs were designed: rehabilitation.

[121] Fourthly, there was no evidence led by Novabrite of any proposal in JMA4, JMA5 or JMA6 to rehabilitate Emrail, was ever made. As stated above, the mere absence of a proposal is not per se, fatal. But as a matter of good practice, a draft proposal should be included, which would incidentally, go to show bona fides.

[122] Conversely, its absence may, in the light of surrounding circumstances, show a lack of bone fides. The surrounding circumstances show an abject indifference in four years in complying with the critical pre-conditions in ss 404 and 407. This includes the absence of a proper nomination of a qualified JM. And the absence of any statement supported with real proof, that the applicant considered that the matters in s 404(b) could be achieved. Finally, there is an inexplicable absence of any progress towards rehabilitation and the failure to properly nominate a JM.

[123] The absence of a proposal (in these surrounding circumstances) does show that rehabilitation was not the predominant objective of the JMA6.

ABUSE — CONCLUSION

[124] Based on the collective evidence set out in paras 97 to 123 above, I have no hesitation in concluding that the filing of JMA6 is an abuse of process.

Postscript — A concerted effort

[125] For the sake of completeness, I accept that there is evidence of a concerted effort by the applicants in JMA2 to JMA6 to trigger the moratoria, in that:

(a) two different applicants in JMA3 and in this JMA6 are represented by the same solicitors;

(b) the applicant in JMA2 (Zabima Engineering), and the applicants (Novabrite) in JMA4, JMA5 and JMA6 have a common director who deposed the affidavits in all four JMAs, namely Encik Admi Othman;

(c) the affidavits in JMA2 to JMA6 are similar (with the exception of JMA6, which includes a token attempt to nominate a JM after Justice Murad

dismissed JMA5 for a failure to nominate); and

(d) Parushan (the applicant in JMA3) filed an affidavit in support in JMA6, encl 10. It does seem that for the purpose of JMA6, Novabrite and Parushan may be part of a concerted effort to obtain a moratorium for Emrail's benefit.

[126] It may be that these applicants were indeed 'friendly creditors' procuring the moratoria for Emrail's benefit. However, it is unnecessary to establish an abuse to find that all these JMAs were part of one concerted effort. All that is required is to establish the abuse in filing JMA6. This has been conclusively shown.

NOVABRITE AND EMRAIL RAISE PROCEDURAL OBJECTIONS

[127] In resisting the allegations of abuse, Novabrite and Emrail have largely raised procedural responses to the claims of abuse.

Liberty to file afresh

[128] First, counsel for Novabrite argues that Justice Murad, after dismissing JMA5, nevertheless gave Novabrite 'liberty to file afresh'. Such leave, it is submitted, meant that Novabrite obtained permission to file JMA6 free from any allegation of abuse.

[129] After this issue was raised, I took the opportunity to listen to the audio recording of the proceedings in JMA5 on 25 March 2024. All this showed that all Justice Murad said was that if the applicant wanted to file afresh it was up to them. This is confirmed by Novabrite at para 15 of encl 2.

[130] In my mind, this did not amount to granting 'leave to file afresh'. In any event, there is no perfected order showing such leave.

[131] Further, Justice Murad also said that it appeared that JMA5 was, on the balance of probabilities, an abuse. In light of His Lordship's observation, I cannot believe that Justice Murad intended to give Novabrite a judicial imprimatur of sorts, to file JMA6 free from any allegation of abuse.

[132] In any event, even if 'leave to file afresh' were granted, it does not help Novabrite. The effect of such leave was explained by Wong Kian Kheong J (as he then was) in *Malaysia Building Society Bhd v Mohd Zainuddin bin Omar & Anor* [2019] MLJU 1354, thus:

> (2) … The effect of liberty to file afresh has been explained in *Charles Koo*, at [19(b)], as follows:

[19(b)] the High Court's decision in first OS has expressly given liberty to the Plaintiffs to file a fresh action. The effect of 'liberty to file afresh' is significant as explained in the following cases:

(i) in *Tara Rajaratnam v Datuk Jaginder Singh & Ors* [1981] 1 MLJ 232, at 234, Wan Suleiman FCJ in the Federal Court decided as follows:

> We are of the view that the two orders in granting the appellant liberty to file a fresh action can only mean *that no final decision has been pronounced* so as to estop the appellant 'in any subsequent litigation from disputing or questioning such decision on the merits', so that the plea of *res judicata must fail.*

(ii) the Court of Appeal in a judgment delivered by Gopal Sri Ram JCA (as His Lordship then was) in *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817, at 821, decided as follows:

> [6] Before us, counsel for the respondents, Marina Tiu, in supporting the learned judge's decision has argued that the appeal should be dismissed because the appellant had taken a step in the proceedings, thereby depriving it of its right to seek a stay. She has drawn our attention to a previous application made by the appellant dated 26 May 2006. In that application, the appellant sought an order for stay and in the alternative to transfer the suit to the High Court in Tawau, Sabah. We have perused the order made on that application and find that the learned judge did transfer the suit to Tawau and disallowed the other prayers but *granted the appellant liberty to file afresh*. We accordingly find *no merit in the argument of the respondents' counsel that this is a case where the doctrine of issue estoppel would apply*. In our judgment no issue was determined by the High Court hearing at 28 March 2007. All that happened was that the suit was transferred to Tawau and the appellant's right to make a fresh application for stay preserved. (Emphasis added.)

[133] As such, the effect of an order 'with liberty to file afresh' is to allow the party whose application was dismissed or withdrawn, to re-file a similar application without being met with a plea of res judicata or issue estoppel.

[134] No such plea is made against the filing of JMA6, thus rendering the effect of any such order granting 'liberty to file afresh' moot. The objection fails. What is alleged is an abuse of a different kind. It is for filing JMA6 for a collateral purpose.

No O 18 r 19 application need be filed

[135] Secondly, Novabrite raised the objection that I am precluded from setting aside JMA6 as this can only be done on an application to strike out under O 18 r 19 (see paras 63 to 65 of encl 45). He relies on *Gasing Heights* at p 275. But this was in the context of not challenging an abuse by way of collateral proceedings. The court held:

> As a general rule, I think it safe to state that a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process, must take that objection in *those very proceedings* under O 18 r 19(1)(d). The filing of a *collateral action* as was done in this case is itself an abuse of process which must result, as happened here in its being struck out. (Emphasis added.)

[136] The Court of Appeal in *Lim Chee Kuo v The Pacific Bank Bhd* [2011] 5 MLJ 230 followed *Gasing Heights*.

[137] Counsel effectively submits that there is an inflexible 'rule' that a challenge for abuse must be made by an application under O 18 r 19. With respect, I cannot accept that objection for the following reasons.

A general but non-mandatory rule

[138] This alleged 'rule' should not be taken as an absolute rule of procedure requiring an O18 r 19 application.

[139] Wong Chee Lin J in *Conweld Engineering Sdn Bhd & Ors v Goh Swee Boh @ Goh Cheng Kin & Anor* [2019] MLJU 1359, in my mind, correctly explained the ambit of *Gasing Heights* and *Lim Chee Kuo*. Her Ladyship held at para [56], that the need to file an application under O 18 r 19 as stated in these cases was only a general rule:

> [56] I am of the view that the dicta in the abovesaid cases set out *the general rule*. It is settled law that the courts frown upon the practice of applying to strike out winding up petitions under O 18 r 19 of the Rules of Court 2012 because that will generally delay the hearing of the winding up petition. In this case, I note that the plaintiffs were involved in applying to set aside the PL order and the Mareva order *on an urgent basis*. ... I would not therefore dismiss the plaintiffs' claim simply on the basis that they could have but did not file a striking out of the winding up petition. (Emphasis added.)

[140] In *Conweld Engineering* at para [56], the 'general rule' was not applied. It was also noted that the practice of applying to strike out winding up petitions under O 18 r 19 was frowned upon as such applications will generally delay the hearing of the winding up petition. Her Ladyship also noted that the plaintiffs were involved in applying to set aside the order for a provisional liquidator and a Mareva injunction on an urgent basis. An O 18 r 19 application would only delay such urgent proceedings.

[141] Similarly, in this case, encl 14 was filed with a certificate of urgency. And, under r 9 of the Rescue Rules, the hearing date of a JMA is to be fixed

within 60 days of filing. This shows that JMA6 should be dealt with expeditiously. JMA6 was filed on 8 April 2024. This means that JMA6 should have been heard by 7 June 2024.

[142] As it is, matters have been delayed. And to insist that Balaranee file an O 18 r 19 application (being a general but not mandatory rule) would only delay the disposal of leave NoA and JMA6 itself.

[143] As such, as in *Conweld Engineering*, I will not apply the general rule.

REMEDIES AND TIMING

[144] The final issue is this. Having found that the filing of JMA6 was an abuse, what am I to do with the offending JMA6. I had posed this question to counsel in the event I found an abuse. In particular, I did ask counsel as to whether I could act on my own volition.

Ex proprio motu

[145] The question is whether I may act on my own volition to redress the abuse. In my judgment, I may. My reasoning is as follows.

[146] First, the starting point in the analysis is the decision of the House of Lords in *Hunter v Chief Constable of West Midlands Police and other respondents (on appeal from McIlkenny v Chief Constable of the West Midlands)* [1982] AC 529. Lord Diplock stated at p 536:

> My Lords, this is a case about abuse of the process of the High Court. It concerns the *inherent power which any court of justice must possess to prevent misuse of its procedure* in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise *bring the administration of justice into disrepute* among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which *the court has a duty (I disavow the word discretion)* to exercise this salutary power. (Emphasis added.)

[147] So, I emphasise that the court has a *duty* and not merely a discretion, to ensure that its procedure is not misused. It is based on the need to protect the very administration of justice. The existence of this duty was acknowledged by Liza Chan J in several decisions including *Ace Holdings Bhd v Lukman Hakimi bin Abdullah (trading under the name and style of LH Million Resources)* [2023] MLJU 645, where the court process was found to have been abused to 'buy

time'. At para 62, Her Ladyship held:

> [62] Instead, I find there could be no doubt that this OS is filed by the plaintiff as an artful machination to *buy itself time*. When the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, it becomes an abuse of process. The categories of abuse are not closed. When abuse is revealed, the *court has a duty, not a discretion,* to dismiss the action: *Hunter v Chief Constable of West Midlands Police and other respondents (on appeal from McIlkenny v Chief Constable of the West Midlands)* [1982] AC 529, per Lord Diplock at 536D. (Emphasis added.)

[148] However, there were procedural objections to a dismissal. Emrail submits that I cannot grant such relief in relation to JMA6 as it is not prayed for in encl 14, see paras 18 to 20 of encl 56. And no remedy is sought in leave NoA to remedy an abuse.

[149] I find that to be a non sequitur. Given the affirmative duty (not discretion) of the court to act to protect its processes, to limit the actions of the court to the stance taken and relief sought by the litigants, makes little sense. The court must be able to act *ex proprio motu*, untrammelled by the adversarial positions of the litigants. In my judgment, a court need not wait for an application by a litigant to redress an abuse of the court's own process. The court may do so of its own volition.

[150] This conclusion is self-evident when considering the hypothetical where no party makes an application to redress a glaring abuse. If Emrail were correct, the court would be powerless to protect or redress an abuse of its own process, absent a challenge by a litigant. This result is too absurd to contemplate.

[151] I am thankful to find support in the decision of the Federal Court of Australia in *Ashby v Slipper* (citing Lord Diplock dicta in *Hunter* which I have also cited in para 147 above), which I will quote *in extenso*. The decision was in the context of comments made by a court on the manner in which a lawyer has conducted proceedings:

> [328] There will be a variety of circumstances where a court may have occasion to comment adversely upon the manner in which a legal practitioner has acted in the conduct of a proceeding before the court ...
>
> [329] One such circumstance may arise in the context of a court being concerned to prevent its process from being abused. It is well recognised that the court has a *duty* as part of its inherent or, more accurately, implied jurisdiction, to prevent its process from being abused (*Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 201; [1960] ALR 574 at 583 (*Clyne*), *Jago v District Court (NSW)* (1989) 168 CLR 23; 87 ALR 577; [1989] HCA 46).

[330] The importance of that duty and its rationale, is explained in the following observations of Richardson J in *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 at 9:

> Misuse of the judicial process tends to produce unfairness and to *undermine confidence in the administration of justice*. In a number of cases in recent years this Court has had occasion to consider the inherent jurisdiction of the High Court, and on appeal this Court, to take such steps as are considered necessary in a particular case to protect the processes of the Court from abuse. (See particularly *Moevao v Department of Labour* [1980] 1 NZLR 464 and *Taylor v Attorney-General* [1975] 2 NZLR 675.) In exercising that jurisdiction, the Court is protecting its ability to function as a Court of law in the future as in the case before it. The *public interest in the due administration of justice* necessarily extends to ensuring that the Courts' processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme step of staying a prosecution or *striking out* a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes. In *Hunter v Chief Constable of West Midlands Police and other respondents (on appeal from McIlkenny v Chief Constable of the West Midlands)* [1982] AC 529 Lord Diplock began his judgment, which was concurred in by the other members of the House, with these words:
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its proceduralrules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the *court has a duty (I disavow the word discretion)* to exercise this salutary power.
>
> Such is the fundamental importance of the doctrine to the fair and proper administration of justice that *Lord Diplock characterised the exercise of the power in appropriate cases as a duty rather than a discretion.*

[331] The duty on a court to prevent an abuse of its process extends to abuses which come to the attention of the court, *even if the abuse is not part of a pleaded case* before the court. In the case of *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84, a case whose facts bear some resemblance to the facts in this case, Cooke J observed at 89, as follows:

> *Moreover, the inherent jurisdiction* to strike out a statement of claim as an abuse of process is one which the Court may come under a duty to exercise. It is *more than a matter of discretion*: *Hunter v Chief Constable of West Midlands Police and other respondents (on appeal from McIlkenny v Chief Constable of the West Midlands)* [1982] AC 529*; Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8. With this in mind we heard argument extending beyond the scope of

A the abuse of process ground as formulated in the letter already mentioned. Mr Gazley, while opposing any widening of the ground, was heard on the whole matter. I think that this Court would be failing in its responsibility if we did not approach the issue of abuse of process in a broad way.

B [332] Somers J (at 95) made observations to similar effect:

It is not in my view material that the League and Mr Riddoch have not pleaded abuse of process save in a limited way. The Court in this field is concerned with proceedings which are ex facie lawful, that is to say are within the rules about procedure. But to prevent those rules being used oppressively the *Court will intervene proprio motu* if necessary. It recognises that the literal application of the C law itself can be a tyranny. (Emphasis added.)

[152] As such, a court must (not may) intervene *ex proprio motu*, on its own volition, under the inherent jurisdiction to redress an abuse of its process. In D this respect, the power to act on the court's own volition to strike out proceedings for abuse was also recognised in Malaysia in a series of cases decided by Hamid Sultan J (as he then was) culminating in *Moses Bartholomew v Sivanesan a/l Achalingam & Ors* [2013] 8 MLJ 232 at para 15.

E **[153]** I am, however, mindful that in an adversarial system, the court should be slow to unduly interfere in pending proceedings. In *Protocol for the control and management of heavy fraud and other complex criminal cases* [2005] 2 All ER 429 in the context of the court intervening on its own volition in complex F fraud trials, Lord Woolf struck a cautionary note in relation to the Criminal Procedure Rules 2005, which observation is equally important to civil proceedings.

(vii) The exercise of the powers

G (a) The 2005 rules require the court to take a more active part in case management. These are salutary provisions which should bring to an end interminable criminal trials of the kind which the Court of Appeal criticised in *R v Jisl* [2004] All ER (D) 31 (Apr) at [113]–[121].

H (b) Nevertheless, these salutary provisions do not have to be used on every occasion. Where the advocates have done their job properly, by narrowing the issues, pruning the evidence and so forth, it may be quite inappropriate for the judge to 'weigh in' and start cutting out more evidence or more charges of his own volition. It behoves the judge to make a careful assessment of the degree of judicial intervention which is warranted in each case.

I (c) The note of caution in the previous paragraph is supported by certain experience which has been gained of the CPR (on which the 2005 rules are based). The CPR contain valuable and efficacious provisions for case management by the judge on his own initiative which have led to huge savings of court time and costs. Surveys by the Law Society have shown that the CPR have been generally welcomed by court users and the profession, *but there have been reported to have been isolated instances in which*

the parties to civil litigation have faithfully complied with both the letter and the spirit of the CPR, and have then been aggrieved by what was perceived to be unnecessary intermeddling by the court. (Emphasis added.)

[154] I am mindful of this warning. However, this case concerns an egregious abuse of the court's process which does require the court to step in. This is particularly so when the automatic moratorium has been in place for four years wrongfully curtailing the rights of the entire body of Emrail's creditors.

[155] In the alternative to the inherent jurisdiction, the appropriate relief may be granted under s 405(4) on an unsuccessful s 404 application if the court considers that it was vexatious and frivolous.

The mala fides of Balaranee

[156] I must deal with one last point raised by counsel for Novabrite which I mentioned earlier. It is this. As Balaranee actually filed JMA1 and supported JMA3 (see paras 18 to 22 of encl 45), this shows that Balaranee is 'approbating and reprobating' and is not being forthright in not disclosing this in encl 15. There is some force in this point. And I must say that I do frown on Balaranee not being forthright on its involvement in JMA1 and JMA3.

[157] That said, the object of Novabrite's complaint is that the conduct of Balaranee should prevent any negative relief sought against JMA6, and somehow forgiving any abuse in filing JMA6.

[158] I cannot accept that submission.

[159] This is a case where the court is acting on its own volition. The conduct of the complainant is not decisive when the court acts on its own motion to redress an abuse of its own process. If the abuse is shown to have wrongfully triggered the moratorium, it matters not if the complainant was less than forthright. The effect of the improperly obtained moratorium on the administration of justice and the rights of the other creditors matters more.

Remedies for the abuse

[160] Given my finding of the abuse and my duty to intervene *ex proprio motu*, what is left to be determined is the remedy to be granted to redress the abuse.

[161] In general, the remedy for an abuse of process is to stay or strike out the offensive proceedings. In *Badiaddin bin Mohd Mahidin & Anor v Arab*

Malaysian Finance Bhd [1998] 1 MLJ 393, the Federal Court held:

> On the question of such inherent jurisdiction, first there is the inherent jurisdiction to stay any proceeding (which includes an order of execution), which is an abuse of process (see for instance *Metropolitan Bank v Pooley* (1885) 10 App Cas 210; *Lawrence v Lord Norreys* (1890) 15 App Cas 210 and in the latter, Lord Herschell said it ought to be sparingly exercised and only in very exceptional cases). Lord Blackburn in *Metropolitan Bank* said that on the other hand, *a stay* or *even dismissal* of proceeding may 'often be required by the very essence of justice to be done'. Thus, the inherent jurisdiction to stay any proceeding which is an abuse of process exists undoubtedly. (Emphasis added.)

[162] In this case, the abuse complained of is the filing of the JMA which triggered the automatic moratorium. A stay may not cure the abuse as the filing may well remain intact, thus preserving the automatic moratorium. The only effective remedy is to strike out JMA6.

[163] In *Badiaddin*, Peh Swee Chin FCA when dealing with the remedy for an abuse, considered *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, said:

> On further appeal to the House of Lords, Law Lords were unanimous that the appeal should be allowed on the ground of so commencing action without authority. Earl of Halsbury alone held (merely) that appeal should be allowed. That would have meant by necessary implication, that the summary judgment was set aside and unconditional leave to defend was granted. Lord Parker, in allowing the appeal, appears to make a different consequential order in exercising of an inherent jurisdiction to *curb an abuse of process* by ordering further that the whole action be *struck out* and all orders therein discharged. Viscount Mersey, Lord Kinnear, Lord Atkinson, Lord Shaw and Lord Parmoor all agreed to the order proposed by Lord Parker. Lord Parker's proposal of course, carried the day. (Emphasis added.)

[164] Finally, counsel for Novabrite submits that I must wait for the hearing of encl 1 before acting on the abuse (see encl 45 at para 63). I think not. I am reminded of Lord Diplock's statement that once the abuse is shown, the court has a duty to act. In my judgment, the court should not allow the abuse to continue for a moment longer than is necessary, particularly when its effect continues to wrongfully to restrain creditors. In *Secretary of State for Trade and Industry v Baker and others* [1998] Lexis Citation 1501, Johnathan Parker J (as he then was) held:

> Lord Diplock's disavowal of the word 'discretion' in this context makes it clear that once the court has concluded, after weighing all the relevant circumstances, that a particular proceeding is an abuse of its process, it has a *duty* to act *to prevent that abuse continuing.* (Emphasis added.)

[165] I accordingly, *ex proprio motu,* strike out JMA6 and set aside the filing

thereof on 8 April 2024. This will free the creditors from the shackles of the moratorium. I am fortified in my conclusion by my earlier finding (at para 72 above) that the statutory pre-conditions to the filing of JMA6 have not been met, thus also invalidating JMA6. The failure to meet the pre-conditions before filing may indeed be an abuse in itself.

LEAVE FOR PETITION 249 NUNC PRO TUNC

[166] With JMA6 struck out and its filing set aside, the automatic moratorium falls. The prohibitions in s 410 no longer apply. There is now nothing preventing the winding up proceedings in Petition 249 from proceeding against Emrail. However, as Petition 249 was filed during the moratorium, retrospective leave is needed to validate such filing.

Retrospective leave requirements

[167] It is settled that a court may grant retrospective leave, *nunc pro tunc*, in appropriate circumstances. The Federal Court in *Lai King Lung* explained the nature of leave *nunc pro tunc* leave, and the need to show hardship before such leave will be granted. The Federal Court held at [23]:

> The court will in certain cases allow a proceeding to be treated as being taken on a particular date, although as a matter of fact not completed until afterwards: Where this is done the proceeding is said to be taken *nunc pro tunc*. The applicability of the rule of *nunc pro tunc* which is really based on the maxim actus *curiae neminem gravabiti* is confined to those cases only in which *some hardship would be visited upon a party, without any fault of his* unless he were relieved from it by allowing a proceeding as to be taken now for then. (Emphasis added.)

[168] In this case I believe that there has been hardship. It appears that certain compulsory steps were taken in Petition 249, see exh 'BMV-19' at pp 356 to 370 of encl 15. Balaranee has expended time and costs in preparing for the hearing of Petition 249. I accept that it would cause Balaranee hardship within *Lai King Lung* if leave *nunc pro tunc* were refused, as such efforts and costs would be wasted. Nothing would be achieved by making Balaranee file a fresh winding up petition.

[169] In this respect, I cannot accept Emrail's submission at para 10 of encl 57 that the court has no power under s 410(c) to grant leave *nunc pro tunc* to allow Balaranee to continue with Petition 249. With respect, the proviso to s 410(c) does allow proceedings to be continued against the company with leave.

[170] In any event, there is no need for s 410(c) itself to expressly provide that a court may grant *nunc pro tunc*. While there is power to grant leave under s 410(c), the power to grant such leave *nunc pro tunc* is derived from the court's

inherent jurisdiction, see *Hartley Poynton Ltd v Ali (as executor and trustee of the estate ALI)* [2005] VSCA 53 at para [76]:

> [76] The conclusions I would suggest should be drawn from common law and Chancery practice as to antedating, as developed by Australian courts (but overlooking certain misconceptions which appear to have crept in inadvertently), are as follows. First, the power of the courts to antedate orders and judgments, which comprehends from its terms the making of orders *nunc pro tunc*, is derived from the *Court's inherent jurisdiction* or, as expressed in the courts of common law, was a power derived from the common law: see *Isley*'s case; *Copley v Day*; *Evans v Rees* ... (Emphasis added.)

[171] As such, there is no necessity for the section itself (here, s 410(1)(c)) to vest the court with power to grant leave *nunc pro tunc.* The Federal Court in *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1, held that the court could grant sanction under s 236(3) (now s 486(2) of the CA 2016) *nunc pro tunc*, even though the said section did not expressly grant the power to do so.

[172] However, I do accept that on the true construction of s 410(a) there is no proviso for leave of court as in ss 410(b) and (c). As such, s 410(a) prevents, without exception, a winding up order or resolution for winding up of the company while the current JMA6 is in place. And I agree that the court has no power to wind up a company during the currency of JMA6.

[173] Given that JMA6 has been struck out, this issue does not arise.

The criteria for leave nunc pro tunc

[174] I have considered the criteria in the exercise of the court's discretion whether to grant leave *nunc pro tunc* under s 471(1) in *Tan Aik Ling v CT World Construction Sdn Bhd and another suit* [2024] MLJU 2479. An important consideration is the balance of convenience (see para 47).

[175] In my judgment, the discretion under s 410(c) involves balancing the interests of the applicant creditor as against the interests of the creditors and shareholders as a whole. This is really the balance of convenience but in the context of s 410(c).

[176] When the proceedings for which leave under s 410(c) is sought are winding up proceedings (Petition 249), the balance is simply to weigh (in all the circumstances) the interests of the applicant against the interests of stakeholders as a whole. As things stand and as there are no extant restructuring proposals to rehabilitate Emrail, Emrail may be currently seen as being hopelessly insolvent or more accurately, 'irreversibly insolvent', see paras 164,

165 and 306 of *BTI 2014 LLC v Sequana SA and others* [2022] 3 WLR 709, Supreme Court UK.

[177] The answer to the balance question is then obvious.

[178] The old adage that hopelessly insolvent companies should be wound up is apt. Indeed, it would be against commercial morality to allow hopelessly insolvent companies to trade, see *Airasia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942 at paras 106 and 107. Winding up is the appropriate remedy.

[179] Accordingly, I grant leave *nunc pro tunc* under prayer 2 and prayer 2(ii) of encl 14 validating Petition 249 to wind up Emrail. Prayer 2(i) is academic, and no order is made in respect thereto.

[180] As a postscript, I say that if there was a genuine proposal to rehabilitate Emrail, perhaps an appropriate order could have been fashioned to help save Emrail through a genuine restructuring proposal, given the policy to rehabilitate financially ailing companies, see *Maju-TH* at para 62.

[181] But there is none.

CONCLUSION AND ORDERS

[182] I reiterate the orders I have made.

(a) first, on 3 October 2024, I made an order allowing Balaranee liberty to intervene as per prayer 1 of encl 14;

(b) secondly, I order, *ex proprio motu*, that encl 1 be struck out and that the filing of JMA6 be set aside; and

(c) thirdly, I also grant leave *nunc pro tunc* under s 410(1)(c) pursuant to prayer 2 and prayer 2(ii) of encl 14 validating the filing of Petition 249. I make no order under prayer 2(i) as it is academic.

[183] Finally, a consequential order should be made to prevent any further abuses. There is jurisdiction to make such orders, see *Han Yeow Ming* at paras 5 and 26 and the 'Further Ancillary Order' in *Dynawell*, although not identical to the consequential order I intend to make herein.

[184] Given that it was third parties who filed JMA1 to JMA6, I have included third parties within the ambit of the consequential order, which is in the nature of an injunction, see the House of Lords in *Attorney-General v Times Newspapers Ltd and another* [1992] 1 AC 191 at p 231 for the liability of third

parties when they knowingly frustrate the operation of an injunction and may be guilty of contempt even although they are neither named in the order nor have assisted the person who is named to breach it.

[185] I therefore also order that any further application for a JMO under s 404 of the CA 2016 or any application for a restraining order under s 368(1) of the CA 2016, both of which will trigger an automatic moratorium for the benefit of Emrail, whether filed by any third party or Emrail itself, shall not be filed except with leave of court and after full disclosure of all matters that may affect the court's decision to make any order sought in such application.

[186] In view of the finding of abuse, I will hear submissions as to costs.

Order accordingly.

Reported by Ashok Kumar